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93-117

No. 93-

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

BRIAN K. BRISCOE,

Petitioner,

v.

DEVALL TOWING & BOAT SERVICE OF HACKBERRY, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT L. HACKETT #6397
OESTREICHER & HACKETT
307 Exchange Alley
New Orleans, Louisiana 70130
Telephone: (504) 529-7666

Attorney for Plaintiff/Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

52 pp

QUESTIONS PRESENTED FOR REVIEW[1]

1. Will the United States Supreme Court resolve a conflict among the circuits and decide whether and/or under what circumstances a Jones Act seaman may recover for "purely" emotional injuries?

2. May a Jones Act seaman recover for purely emotional injuries resulting from the negligence of his employer where 1) the seaman experienced physical impact, physical injury, threat of physical impact or injury, and/or was in the "zone of danger" and 2) the seaman's emotional injuries had substantial physical manifestations, but 1) where the seaman's direct actual physical injuries are trivial or insignificant and 2) the emotional injuries did not arise out of the physical injuries?

3. Did the Court of Appeals err in affirming, without opinion, the trial court's finding that there were no genuine issues of material fact and that Devall Towing was entitled to entry of summary judgment as a matter of law?

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[1] Parties to this action are Brian K. Briscoe, plaintiff/petitioner, and Devall Towing & Boat Service of Hackberry, Inc., defendant/respondent.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari issue to review the April 20, 1993, opinion of the United States Court of Appeals for the Fifth Circuit affirming the trial court's grant of summary judgment entered September 17, 1992.

REPORTED OPINIONS

Briscoe v. Devall Towing & Boat Service of Hackberry, Inc., 799 F. Supp. 39 (W.D. La. 1992). The Fifth Circuit opinion was not published. See *Briscoe v. Devall Towing &*

Boat Service of Hackberry, Inc., 992 F.2d 323 (5th Cir. 1993) (table). Copies of both opinions appear in the Appendix.

JURISDICTION

The United States District Court for the Eastern District of Louisiana issued a memorandum ruling, filed on September 17, 1992, granting the motion for summary judgment of Devall Towing & Boat Service of Hackberry, Inc. A-3. The order granting summary judgment and dismissing plaintiff's complaint was filed on September 17, 1992. A-13. The trial court's decision was affirmed by a three-judge panel of the United States Court of Appeals for the Fifth Circuit in an unpublished opinion dated April 20, 1993. A-1. The suggestion of Brian Briscoe for rehearing en banc was denied on June 4, 1993. A-16.

Petitioner invokes the jurisdiction of the Supreme Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

45 U.S.C. § 51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce,

or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipement.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

46 U.S.C. App. § 688

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of

such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Fifth Circuit Local Rules

47.5.1 Criteria for Publication. The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion will be published if it:

> establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;
>
> applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;
>
> explains, criticizes, or reviews the history of existing decisional or enacted law;
>
> creates or resolves a conflict of authority either within the circuit or between this circuit and another;
>
> concerns or discusses a factual or legal issue of significant public interest;

is rendered in a case that has previously been reviewed and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it:

is accompanied by a concurring or dissenting opinion;

reverses the decision below or affirms it upon different grounds.

47.5.3. Unpublished Opinions. Unpublished opinions are precedent. However, because every opinion believed to have precedential value is published, an unpublished opinion should normally be cited only when it (1) establishes the law of the case, (2) is relied upon as a basis for res judicata or collateral estoppel, or (3) involves related facts. If an unpublished opinion is cited, a copy shall be attached to each copy of the brief.

47.6 Affirmance Without Opinion

When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole, or (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant, and the Court also determines that no reversible error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Loc.R.47.6."or "ENFORCED. See Loc.R.47.6."

STATEMENT OF THE CASE

The essential facts in this case are not disputed and must be viewed in the light most favorable to Brian Briscoe. On June 26, 1991, plaintiff, Brian Briscoe, was employed by defendant, DeVall Towing, as a pilot aboard the M/V MAR-RAY. At approximately 7:30 p.m., Briscoe was asleep in his bunkroom, having completed his shift. He was awakened by the lurching and shifting of the vessel and the spilling of items in his bunkroom onto the floor. He himself was tossed about in his bunk. He determined that the vessel was listing severely, taking on water and in imminent danger of sinking. He exited his bunkroom dressed only in his underwear and hung onto handrails while attempting to reach the bottom deck to retrieve a life vest. The handrails, stairways and passages were difficult to use due to the severe list of the vessel. At one point, Briscoe slipped and "slid down all the way to the starboard side of the boat." He feared the vessel would roll on top of him, preventing his escape and costing him his life. With the vessel on the verge of sinking, Briscoe jumped overboard into the water and swam to a nearby vessel, the WOOD RIVER EXPRESS. Shortly thereafter, the M/V MAR-RAY sank in the Calcasieu River ship channel.

Brian Briscoe was extremely fortunate in that he escaped with his life and suffered no significant physical

injuries. He testified that he suffered "a few scrapes and bruises as a result of the vessel shifting" but that these injuries caused no residual problems. Briscoe was unfortunate, however, because shortly after the sinking of the MAR-RAY, he began to develop serious emotional difficulties including difficulty sleeping, nightmares in which he re-lived the sinking, and general difficulty in functioning in normal day-to-day life. When these problems did not resolve themselves, Briscoe sought psychiatric treatment and voluntarily had himself admitted to Charter Hospital, a psychiatric hospital. He was an inpatient for four weeks and was diagnosed by his treating physician/psychiatrist, Dr. Nguyen, as having major depression and post-traumatic stress disorder (PTSD). Briscoe continued treatment following his discharge.

In addition to emotional injuries and distress verified by the *subjective* complaints of Briscoe, Briscoe's psychologist, David Post, testified that there were also *objective* physical symptoms relating to Mr. Briscoe's condition. In particular, objective observations were made in the hospital of such things as exaggerated startle response and disturbed sleep patterns. The records of Charter Hospital verify these objective findings.

The fall and sliding across the deck of the M/V MAR-RAY and the jumping overboard into the water constitute *physical impacts* causally related to the sinking of the M/V MAR-RAY. The scrapes and bruises suffered by Briscoe during the fall constitute *physical injuries*. His participation in the sinking of the M/V MAR-RAY subjected Briscoe to the *threat of physical impact and/or serious injury or death* in the form of being trapped in the vessel, dragged to the bottom of the ship channel, and/or

drowned. Similarly, his participation in the sinking of the M/V MAR-RAY placed Briscoe in the *zone of danger* of serious injury or death in the form of being trapped in the vessel, dragged to the bottom of the ship channel, and/or drowned.

ARGUMENT

In *Atchison, Topeka, and Santa Fe Railway Company v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), the United States Supreme Court suggested that railroad workers might recover for emotional injuries under the Federal Employer's Liability Act (FELA), § 1 et seq., 45 U.S.C.A. § 51 et seq.[2] The Court said, however, that the question might

> not be susceptible to an all-inclusive "yes" or "no" answer. As in all other areas of the law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

480 U.S. at 570, 107 S.Ct. at 1418. The Supreme Court's statements in *Buell* constituted a tacit invitation for the Courts of Appeals to consider purely emotional injuries under FELA and the Jones Act.

After six years and approximately eighteen reported cases involving claims for emotional distress, *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 382 (3rd Cir. 1993)

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[2] The Jones Act incorporates FELA. 46 U.S.C. App. § 688; *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511 (1957).

(cataloging and discussing reported cases), there is little uniformity in the results or rationales relative to Jones Act and FELA claims for emotional injuries. In *Gottshall*, the most recent reported appellate decision addressing the issue, the Third Circuit said,

> It is clear that there are open conflicts among the circuits. A review of the decisions in other circuits in the wake of *Buell* indicates that there is no common discernable principle, test, view or attitude.

988 F.2d at 365.

Justices White and Thomas recognized this conflict in January of 1992 when they dissented from the denials of petitions for writs of certiorari in *Ray v. Consolidated Rail Corp.*, ___ U.S. ___, 112 S.Ct. 914, 914, 116 L.Ed.2d 813 (1992) and *Carroll v. Consolidated Rail Corp.*, ___ U.S. ___, 112 S.Ct. 916, 916, 116 L.Ed.2d 816 (1992). There, Justices White and Thomas were concerned with the apparent conflict between the Seventh Circuit's physical contact requirement and the Fifth Circuit's standard set out in *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1009 (5th Cir. 1991) which held that emotional injury claims were cognizable "even without an accompanying physical injury or physical contact".

Although the precise conflict noted by Justices White and Thomas de-materialized when the Fifth Circuit, on rehearing en banc, found on the facts that the plaintiff's claim was not cognizable even under the most liberal theory of recovery, *Plaisance v. Texaco, Inc.*, 966 F.2d 166, 168 (5th Cir. 1992) (en banc), more recent cases, including

Gottshall and the instant case, demonstrate a lack of uniformity and a clear conflict among the circuits.

A thorough review of the federal circuit court cases as well as relevant state court cases is found in *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 361-66. For the court's convenience, this portion of the text is set out in its entirety in the appendix. See A-16 to A-31.

The narrow issue petitioner seeks to have resolved by the Court is whether physical impact resulting in a significant non-trivial injury is an essential threshold element to recovery by a Jones Act seaman for emotional injuries. In this case, the trial court decided 1) purely emotional injuries are not compensable absent accompanying physical injury, A-7; 2) the physical injuries must be significant and non-trivial, A-7; 3) the emotional injuries must arise out of the physical injuries before a plaintiff may recover, A-7; and 4) a plaintiff may not recover under the zone of danger theory, A-7.[3] The trial court also eliminated the physical impact rule. Since even a trivial physical injury requires an impact as a necessary precedent, impact is relevant only if it produces a non-trivial injury. A-9. In short, the standard in the Fifth Circuit is that recovery for

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[3] The trial court cited *Plaisance v. Texaco, Inc.*, 966 F.2d 166 (5th Cir. 1991) for the proposition that "the Fifth Circuit does not allow a plaintiff to recover because he was in the zone of danger during the accident." A-7. In fact, the Fifth Circuit sitting en banc in *Plaisance* said that whether a plaintiff may recover under the zone of danger theory had not yet been decided in the Fifth Circuit. 966 F.2d at 168. By affirming the trial court's misstatement of the law, the Fifth Circuit, without discussion or analysis and in an unpublished opinion, has held that the zone of danger theory does not support recovery for emotional injuries.

emotional injuries may be had *only* if the emotional injury *arises out of a significant non-trivial physical injury*. In the trial court's words, "a plaintiff may not recover for purely emotional injury under the Jones Act." A-7.

This decision is in conflict with the decisions of at least three, and perhaps four, federal circuits. In the Third Circuit, there is no physical impact or physical injury requirement. If, under the totality of circumstances, the claimant sufficiently demonstrates that his injuries are genuine and serious, he creates a genuine issue for the jury to decide. *Gottshall*, 988 F.2d at 374. The Seventh Circuit permits recovery if there is actual or threatened physical impact. *Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705, (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 914, 116 L.Ed.2d 813 (1992). If the mere threat of physical impact is sufficient, there is necessarily no requirement of a significant non-trivial physical injury. The Ninth Circuit standard has not yet been fully delineated, but recovery may be had if the purely emotional injuries have physical manifestations, such as a heart attack resulting from the stress. *Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366, 1372 n. 2 (9th Cir. 1987). The Fourth Circuit has not decided whether there is or is not a physical injury or impact requirement. Rather, it requires unconscionable abuse or outrageous conduct as a predicate to a claim for negligent infliction of emotional distress. *Elliott v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1229 (4th Cir. 1990).

If Brian Briscoe's case had been decided in the Third Circuit, summary judgment would not have been granted or affirmed. Because Briscoe was an active participant in an event that nearly cost him his life, because his emotional injuries had objectively observable physical manifestations (including documented sleep disturbances), and because Briscoe's emotional injuries were related to

his fear and anxiety concerning his own well-being, he would be entitled to proceed to trial in the Third Circuit. Similarly, in the Seventh Circuit, his being tossed across the deck of a sinking vessel and being forced to jump overboard and swim to a nearby vessel would clearly constitute actual impacts as well as a threat of a more significant actual impact, i.e., sinking to the bottom of the ship channel – also entitling him to a trial. While the Ninth Circuit standard is not fully delineated, the objectively observed physical manifestations of Briscoe's emotional injuries, e.g., sleep disturbances, etc., would apparently be sufficient to allow his case to go to trial. In the Fourth Circuit, it is unclear whether Briscoe's case would go to trial on the physical impact/injury question. There is nevertheless a conflict, however, because the Fifth Circuit apparently does not require outrageous conduct or unconscionable abuse as does the Fourth Circuit.

The conflict among the circuits is demonstrated most ably by a comparison of *Gottshall* and the instant case. After thoroughly reviewing the facts and the law, the Third Circuit held that the issue to be determined was

> whether the factual circumstances here provide a threshold assurance that there is a likelihood of genuine and serious emotional injury. We look not to any specific fact or standard, but to the totality of the factors.

988 F.2d at 371. After considering the physical manifestations to the claimant's injuries, the supporting medical testimony, the close relationship between the claimant and the decedent, and the fact that the claimant was an active participant in the events leading to his emotional injuries, the court was satisfied that the claimant had

sufficiently shown that his injuries were genuine and severe enough to create a genuine issue for the jury to decide.

In the instant case, the trial court did not focus on the genuineness and seriousness of Briscoe's emotional injuries; it focused solely on whether Briscoe had significant non-trivial physical injuries. Although the Fifth Circuit had previously held that trivial physical injuries would not permit a *bystander* to recover for purely emotional injuries related to observation of a traumatic event or injuries to another, *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir. 1989), the trial court ruled that a significant, non-trivial physical injury is a requirement for any recovery for emotional injuries. Thus, the standard in the Fifth Circuit is not whether there is some physical injury or impact, it is not whether an emotional injury has physical manifestations, it is not whether the claimant was threatened with physical impact or injury, and it is not whether the claimant was in the "zone of danger". Rather, the threshold question in the Fifth Circuit is whether the claimant's "purely" emotional injuries are accompanied *and caused* by significant non-trivial physical injuries.

The word "purely" is put in quotations because under the new Fifth Circuit standard, it is a contradiction in terms. If a person must suffer significant non-trivial physical injuries and his emotional injuries must arise out of those physical injuries, his claim is not for "purely" emotional injuries, his claim is for physical injuries and consequential emotional injuries. Cf. *Buell*, 480 U.S. at 570 n. 22, 107 S.Ct. 1418 n. 22 (noting that physical assault and physical symptoms in addition to psychological illness might render injuries not "purely" emotional). In its

unpublished opinion affirming the trial court's decision, the Fifth Circuit cited *Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1989), *Plaisance v. Texaco*, 966 F.2d 166 (5th Cir. 1992) (en banc), and "the District Court's excellent analysis." A-1. Perhaps the most disturbing aspect of the appellate decision is that it was unpublished. Under Fifth Circuit Local Rule 47.5.1, an unpublished opinion is considered to have no precedential value because it was decided on the basis of well-settled principles of law.

Even if there were no conflicts among the circuits, Briscoe was entitled to a trial under Fifth Circuit jurisprudence. Although the official position of the Fifth Circuit is that it is undecided whether a claimant may recover under the zone of danger theory, *Plaisance*, 966 F.2d at 169, the panel holding in this case silently eliminates the zone of danger tests and substantially modifies the physical injury or impact test. Indeed, it precludes any recovery for *any* "purely" emotional injury. But cf. *Anselmi v. Penrod Drilling Corp.*, 813 F.Supp. 436 (E.D. La. 1993) (denying summary judgment because plaintiff who was not physically injured alleged he was in the zone of danger). Although the new Fifth Circuit standard has not been expressly stated and the Fifth Circuit denied a suggestion for rehearing en banc, the result in this case leaves little doubt as to what the Fifth Circuit standard is for Brian Briscoe. Paradoxically, because there was no formal opinion by the Fifth Circuit, A-2 (citing Fifth Circuit Local Rule 47.6), and the decision may not ordinarily be cited as precedent, Fifth Circuit Local Rule 47.5.3, it is conceivable that another panel of the Fifth Circuit will rule in the future that recovery may be had under the zone of danger theory. Indeed, the *Anselmi* case

is factually indistinguishable from the instant case and is proceeding to trial under the zone of danger theory.

By permitting a substantial modification of Fifth Circuit jurisprudence without discussion, in an unpublished opinion, and in an area of law which is anything but well-settled, the Fifth Circuit has violated its own local rules 47.5.1 and 47.6. Thus, the Fifth Circuit has so far departed from the usual course of judicial proceedings, that review by this court is appropriate. Supreme Court Rule 10.1(a).

CONCLUSION

Six years have passed since the Supreme Court decision in *Buell* opened the door to recovery for purely emotional injuries but left to the circuits the task of delineating the circumstances under which recovery might be had. While Briscoe would urge adoption of the standard set forth by the Third Circuit in *Gottshall*, the issue at this time is not how the court will resolve the conflict but *whether* it will act to resolve the conflict.

The Third Circuit in *Gottshall* recognized this Court's observation in *Buell* that determining when a worker may recover under FELA for purely emotional injuries "might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity" and is probably not "answerable without exacting scrutiny of the facts of the case". *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417. In response, the Third Circuit focused on a totality of circumstances test to determine whether the injuries were genuine and serious

rather than on artificial distinctions which preclude recovery by claimants with legitimate emotional injuries.

The facts of this case make it appropriate for review by this Court because Briscoe's emotional injuries were severe, the event in which he was involved was extremely traumatic and could easily have cost him his life, and, through good fortune alone, his physical injuries were insignificant. Further, this purely emotional injury case provides a stage for the court to clearly and specifically delineate the boundaries of recovery.

Considering the open conflicts among the circuits and the Fifth Circuit's departure from the usual course of judicial proceedings, petitioner requests that this Petition for Writ of Certiorari be GRANTED.

Respectfully submitted,

ROBERT L. HACKETT #6397

OESTREICHER & HACKETT

Counsel for Plaintiff/Petitioner
307 Exchange Alley
New Orleans, Louisiana 70130
Telephone: (504) 529-7666

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5011

BRIAN K. BRISCOE,

Plaintiff-Appellant,

versus

DEVALL TOWING & BOAT SERVICE
OF HACKBERRY, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(91-CV-1971-LC)

(Filed Apr. 20, 1993)

Before REYNALDO GARZA, WILLIAMS, and JONES, Circuit Judges.[1]

PER CURIAM:

Based on this court's recent decisions in *Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1989), and *Plaisance v. Texaco*, 966 F.2d 166 (5th Cir. 1992) (en banc),

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

and the district court's excellent analysis, the judgment of the district court is AFFIRMED. See Fifth Circuit Local Rule 47.6.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

BRIAN K. BRISCOE Plaintiff	)	NUMBER CV91-1971-LC
VERSUS	)	JUDGE TRIMBLE
DEVALL TOWING & BOAT SERVICE OF HACKBERRY, INC. Defendants	)	MAGISTRATE WILSON (Filed Sept. 17, 1992)

MEMORANDUM RULING

Now before the court for its consideration is defendant, Devall Towing & Boat Service of Hackberry, Inc.'s ("Devall") Motion for Summary Judgment. Devall contends that under the jurisprudence of the United States Court of Appeals for the Fifth Circuit a plaintiff may not recover under §688 of the Jones Act for emotional injury unaccompanied by physical injury. Devall further contends that there are no genuine issues of material fact. The plaintiff responds that the Fifth Circuit allows recovery for purely emotional injuries under these circumstances.

Background

This court finds that there are no genuine issues of material fact between the facts as alleged by Devall and as alleged by the plaintiff. Nevertheless, whenever this court must choose one version of the facts over the other, this court will view the facts in the light most favorable to the plaintiff. This court assumes that the facts are as

alleged in Plaintiff's various pleadings, specifically his Statement of Contested Facts, Pretrial Statement and Memorandum in Opposition to Defendant's Motion for Summary Judgment, for purposes of Devall's Motion for Summary Judgment. Plaintiff does not allege that he suffered any physical injury in the facts given in his pretrial statement. Further, plaintiff, in listing the issues of fact in his pretrial statement, does not state that there is any issue as to whether he suffered any physical injury. Plaintiff does state in his Statement of contested Facts that it is contested whether plaintiff suffered physical injury, yet he does not identify the injury in his Memorandum in Opposition to Defendant's Motion for Summary Judgment. Rather, plaintiff merely alleges that there was an "impact" and never mentions any injury. Plaintiff then identifies this impact as either the shifting of the vessel, the plaintiff's fall on the deck of the boat, or the jumping overboard and swimming. [Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, page 6] Nowhere does the plaintiff allege that he suffered any actionable physical injury. The plaintiff's only alleged injury was emotional.

On the night of June 26, 1991, the M/V MAR-RAY sank in the Calcasieu Parish Ship Channel. The plaintiff, an employee of Devall, was a deckhand on the M/V MAR-RAY. The M/V MAR-RAY is a 55 foot long, 16 1/2 foot wide pushboat with two diesel engines. The plaintiff was working as a deckhand aboard the M/V MAR-RAY on the night it sank. The captain of the vessel, Scott Guidry, ordered plaintiff off of the vessel when it became apparent that she was going to sink.

Plaintiff then climbed over the port side of the vessel and got into the water and swam at most one hundred (100) feet to THE WOODRIVER EXPRESS. According to plaintiff while in deposition on December 4, 1991, he was skinned up a little and bruised a little with no other physical injury. [Deposition of Briscoe, December 4, 1991, pages 24 & 25] The day after the incident, plaintiff stated that he had no injuries whatsoever. [Briscoe's June 27, 1991 recorded statement, page 6] Further, in his later medical examinations, plaintiff never reported any physical injury. As the analysis will show, it makes no difference which of these statements this court accepts as the truth for even if the plaintiff was skinned up a little and bruised a little his injury is trivial. Thus, under the jurisprudence of the Fifth Circuit, the result remains the same.

On July 15, 1991, Dr. Nguyen Nguyen, a psychiatrist, diagnosed plaintiff as having Post-Traumatic Stress Disorder. Plaintiff, in his Pretrial Statement, states that these emotional injuries were caused by, "extreme anxiety attacks and nightmares regarding the sinking and his near death." [Plaintiff's Pretrial Statement at page 2].

Analysis

Summary Judgment is proper only when the pleadings and other evidence properly before the court show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). When the moving party has made a convincing showing that there are no genuine issues of material fact, the nonmoving party must present more than evidence which

is merely colorable or is not significantly probative; rather, the nonmoving party may only defeat such a motion with significant probative evidence demonstrating the existence of a triable issue of fact. *Resolution Trust Corp. v. Murray*, 935 F.2d 89 (5th Cir. 1991).

The only issue before this court is whether a plaintiff may recover under the Jones Act, 46 U.S.C.App. §688, for purely emotional injuries absent physical injury. The law in the Fifth Circuit is clear that such injuries are not compensable.

In *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir. 1989), the plaintiff, after suffering trivial physical injury – a bruised elbow, was diagnosed as having post traumatic stress disorder. Judge Gee, as the organ of the court, refused to allow the plaintiff to recover under the Jones Act for a purely emotional injury. In analyzing the plaintiff's claim, the court noted that, "[w]hether even a liberal interpretation of the Jones Act requires extending recovery to those who suffer purely emotional injury is doubtful." 866 F.2d at 817.

In *Plaisance v. Texaco, Inc.*, 966 F.2d 166 (5th Cir. 1991), the Fifth Circuit, *en banc*, refused to allow a tug boat captain and his spouse to recover for emotional injury allegedly caused by witnessing a fire in an action against their employer and tug charter to recover under the Jones Act and general maritime law. Judge Davis, writing for the court, instructed that *Gaston* represents the law of this circuit as far as recovery for purely emotional injuries under the Jones Act is concerned. Judge Davis noted that

Gaston only allows a plaintiff to recover for purely emotional injuries if he also suffered physical injury. 966 F.2d at 169.

Most recently, in *Ainsworth v. Penrod Drilling Corp.*, 972 F.2d 546 (5th Cir. 1992), the Fifth Circuit set forth that a plaintiff may only recover for an emotional injury that results from the physical contact. Further, the court noted that the rule in the Fifth Circuit is that trivial physical injuries do not support recovery for emotional injuries. Finally, the court refused to allow recovery under the zone of danger rule. The zone of danger rule provides a mechanism for recovery of emotional injuries absent any physical contact, which result from the witnessing of peril or harm to another if the plaintiff is also threatened with physical harm as a consequence of the defendant's negligence. 966 F.2d at 168. The court specifically noted that the Fifth Circuit does not allow a plaintiff to recover because he was in the zone of danger during the accident.

As these decisions show, a plaintiff may not recover for purely emotional injury under the Jones Act. That this plaintiff has suffered some trivial physical injury is not sufficient reason to allow the plaintiff to recover for an emotional injury. Even accepting the facts in the light most favorable to this plaintiff, he may not recover for his emotional injuries; for, at most, his injuries are trivial.

These cases also indicate that a plaintiff may not recover for emotional injury that does not arise out of a physical injury. Thus, in *Gaston*, the court refused to allow the plaintiff to recover for the emotional injury resulting from watching the death of another. The mere

fact that the plaintiff in *Gaston* had, in fact, suffered an injury – albeit a trivial injury – was not sufficient to justify allowing him to recover for emotional injuries caused by watching the death of another. This plaintiff does not allege that this emotional injury arose out of his physical injuries; rather, he alleges that they arose out of his "extreme anxiety and nightmares regarding this sinking and his near death." [Plaintiff's Pretrial Statement at page 2].

Nor is the impact requirement applicable under these facts. In *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir. 1986), the court found the plaintiff had suffered a physical injury when he was drenched on two occasions by toxic carcinogenic chemicals. In a footnote, the court noted that a drenching with toxic carcinogenic chemicals is sufficient to satisfy the impact requirement. *Hagerty*, at 318 n.1. This statement by the court was necessarily dictum; for the plaintiff had, in fact, suffered a physical injury.

The decisions of the Fifth Circuit referring to the impact requirement set forth in *Hagerty* lead an observer to conclude that the impact rule is not applicable to this sort of negligence claim arising under §688 of the Jones Act for purely emotional injuries unaccompanied by physical injury. This court discerns that the Fifth Circuit only intends for *Hagerty* to apply to cases involving intentional tortious conduct and to cases which involve latent diseases rather than traumatic injuries to seamen. The Fifth Circuit has looked to *Hagerty* for guidance in several cases. *Smith v. A.C. & S., Inc.*, 843 F.2d 854 (5th Cir. 1988), was a latent disease case in which the court relied upon *Hagerty* in its analysis. *Wilson v. Zapata Off-Shore Co.*, 939

F.2d 260 (5th Cir. 1991), was an intentional tort case (sexual harassment) in which the court also relied upon *Hagerty's* impact rule. In *Gaston, Plaisance,* and *Ainsworth,* however, all negligence actions arising under the Jones Act, the court refused to allow a mere impact upon the person of the plaintiff to serve as a sufficient device to permit recovery for emotional injuries when the plaintiff had not otherwise received any physical injuries.

That the Fifth Circuit never intended for *Hagerty* to apply to this sort of claim is hinted at in *Gaston*. When the court, in *Gaston,* referred to the plaintiff's physical injuries as being only trivial, their intentions in *Hagerty* became discernible. For, to suffer even a trivial physical injury an impact is a necessary precedent. Thus, since the court bars a plaintiff from recovering for emotional injuries when his physical injuries are trivial, the court also bars a plaintiff from recovering for emotional injuries when the impact is insufficient to cause more than trivial physical injuries. Chief Judge Politz, writing the court's first opinion in *Plaisance,* 937 F.2d 1004 (5th Cir. 1991), specifically noted that the Fifth Circuit, in *Gaston,* rejected the argument that *Hagerty* provides the basis for recovery for a purely emotional injury:

> "We rejected the argument that *Hagerty* provided the basis for recovery for a purely emotional injury. Rather, we noted that while *Hagerty* 'did observe that a Jones Act recovery was possible without physical impact, that statement was necessarily dictum; for Mr. Hagerty did suffer impact, having been drenched with cancer-causing chemicals.' " 937 F.2d at 1007.

When the Fifth Circuit reconsidered *Plaisance*, en banc, the court emphasized this view:

> "To avoid any possible confusion that our decision to review this case en banc may cause, we emphasize that *Gaston v. Flowers Transp.* continues to represent the law of this circuit." (citations omitted) 966 F.2d at 169.

The court did not stop here, however, Judge Davis continued:

> "The holding in *Gaston* is limited but instructive. The court recognized that a plaintiff suing for purely emotional injuries could recover if he also suffered physical injury." *Id.*

Judges Garza, Davis, and Barksdale, in *Ainsworth*, confirmed that this is, in fact, the Fifth Circuit's rule when they referred to *Gaston* and noted that trivial physical injuries do not support recovery for purely emotional injuries.

It is evident from this review of the cases citing *Hagerty* that the Fifth Circuit does not intend for *Hagerty* to apply to allow a plaintiff to recover for purely emotional injury merely because of some picayune impact. Rather, the rule of the Fifth Circuit, and the rule that this court now applies, is that a plaintiff suing for purely emotional injuries can recover only if he also suffered physical injuries.

Finally, it is important to remember in evaluating claims of this sort that all sailors are attributed an appropriate amount of daring, strength and quality of character as befits one who has chosen a calling that involves braving certain hazards. The court in *Gaston* noted that:

> "Finally, there seems to be something incongruous in undertaking such an extension of liability to seamen and railroaders. These have knowingly and voluntarily chosen callings which, while today perhaps not fairly termed dangerous, yet do involve braving certain hazards and are traditionally not well suited to the squeamish or faint-hearted. To undertake to enlarge such persons in damages in proportion to the delicacy of their emotional reactions seems a curious policy." *Gaston, supra* at 820

Chief Judge Politz cited this approvingly in the Fifth Circuit's first opinion in *Plaisance*. Chief Judge Politz wisely noted:

> "Having so stated, we remain vitally aware that seamen and railroaders have chosen callings that 'involve braving certain hazards [which] are traditionally not well suited to the squeamish or fainthearted.' In evaluating claims of emotional injury, the courts must attribute to those who choose these callings the appropriate daring and strength and quality of character." (citations omitted) 937 F.2d at 1011.

This court recognizes Chief Judge Politz's sagacious insight into this area and so heeds his fiat.

For the foregoing reasons, Devall's Motion for Sumary Judgment is granted.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 16th day of September, 1992.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES
DISTRICT JUDGE

COPY SENT
DATE 9-17-92
BY ln
TO: Lundy
Hackett

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

BRIAN K. BRISCOE	)	
Plaintiff	)	NUMBER CV91-1971-LC
VERSUS	)	
DEVALL TOWING & BOAT SERVICE OF HACKBERRY, INC.	)	JUDGE TRIMBLE MAGISTRATE WILSON
Defendants	)	(Filed SEP 17 1992)

ORDER

After a review of the record and for the reasons given in the Memorandum Ruling of even date:

IT IS ORDERED that Defendant, Devall Towing and Boat Service of Hackberry, Inc.'s Motion for Summary Judgment is granted and this action is hereby DISMISSED WITH PREJUDICE and at plaintiff's costs.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 16th day of September, 1992.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES
DISTRICT JUDGE

COPY SENT
DATE 9-17-92
BY: In
TO: Hackett
Lundy

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5011

BRIAN K. BRISCOE,

Plaintiff-Appellant,

versus

DEVALL TOWING & BOAT SERVICE
OF HACKBERRY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

(Filed JUN 04 1993)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 04/20/93, 5 Cir., ___, ___ F.2d ___)

(June 4, 1993)

Before REYNALDO G. GARZA, WILLIAMS, and JONES, Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES
41 FOR STAY OF THE MANDATE.

Excerpts from *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 361-66 (3rd Cir. 1993)

A.

Among states, a majority recognizes a cause of action in tort for negligent infliction of emotional distress. See *Buell*, 480 U.S. at 569-71 & n. 20, 107 S.Ct. at 1418 & n. 20. But from recognition to application, the doctrinal divergence is great.

A minority employs the "physical impact" rule.[1] The rule requires a contemporaneous physical injury or impact to recover for negligent infliction of emotional distress. "[T]he purpose of the rule requiring physical impact is to prevent 'illusory or imaginative or faked' claims." *Zelinsky v. Chimics*, 196 Pa.Super. 312, 318, 175 A.2d 351, 354 (1961). See Restatement (Second) of Torts, § 436A, comment b (1965).

A large majority of jurisdictions employs either the "zone of danger" or "physical manifestation" rules. See supra n. 1, Comment, 33 Vill.L.Rev. at 796-98 & n. 91; Restatement §§ 313, 436, 436A. The zone of danger rule permits recovery for emotional injuries resulting from witnessing physical harm to another or from fearing physical harm to oneself, provided that plaintiff was actually threatened by physical harm. The physical manifestation rule requires that plaintiff exhibit a physical injury or symptom as the direct and natural result of the initial emotional distress suffered.

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[1] See Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitations Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill.L.Rev. 781, 792-93 n. 59 (1988) (as of 1988 five states plus the District of Columbia have adopted this rule).

Many jurisdictions also permit a bystander to recover for emotional injuries. The quintessential common law case involves the mother who witnesses the death of her child. See *Dillon v. Legg*, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968) (en banc). See generally Comment, 33 Vill.L.Rev. at 806-07 n. 139 (as of 1988 at least ten states have adopted the *Dillon* approach). The Supreme Court of California restated the *Dillon* bystander test as this: Plaintiff can recover if she (1) is present at the accident scene at the time it occurs and contemporaneously perceives the injury to the victim, (2) suffers serious emotional distress as a result of watching the injury, and (3) is closely related to the injured victim. *Thing v. La Chusa*, 48 Cal.3d 644, 668-69, 257 Cal.Rptr. 865, 771 P.2d 814 (1989). As for the last factor, the court limited recovery to relatives residing in the same household, parents, siblings, children, and grandparents of the victim. 257 Cal.Rptr. at 880 n. 10, 771 P.2d at 829 n. 10.

While some jurisdictions require that the plaintiff and the victim stand in some familial relationship, others seem to suggest a showing of strong emotional ties will suffice. See *Champion v. Gray*, 420 So.2d 348, 353 (Fla.App.1982), "decision quashed" 478 So.2d 17, 20 (Fla.1985); *Versland v. Caron Transp.*, 206 Mont. 313, 671 P.2d 583, 587 (1983); *Paugh v. Hanks*, 6 Ohio St.3d 72, 79-80, 451 N.E.2d 759, 766-67 (1983); *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974); *Hunsley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096, 1103 (1976); *Toms v. McConnell*, 45 Mich.App. 647, 207 N.W.2d 140, 144-45 (1973); *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668, 670 (1979). Thus a plaintiff must show physical, temporal, and relational proximity.

Although these common law tests seem as different as they are arbitrary, and have been so criticized, they share common roots. While severe emotional injuries can be just as debilitating as physical injuries, they are not as manifest. One can see frayed skin, but one cannot see frayed nerves; hence, an emotional injury is easier to fake. These tests therefore have been judicially developed to screen causes of action and send only the meritorious ones to juries.

As an unfortunate product of this thinking, the focus shifted from traditional principles of liability to mechanical adherence to these tests, which are based upon a theory that liability is the extraordinary exception. Thus, even in cases of gross negligence resulting in reasonably foreseeable injuries, common law courts preserve the limits of the established rules, thereby precluding recovery for many meritorious claims.[2]

B.

These common law tests provide instruments that are intended to separate the meritorious claims from the others, but they do not necessarily etch the contours of

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[2] See for example, *District of Columbia v. Smith*, 436 A.2d 1294 (D.C.1981) (negligent failure to inform next of kin about death of loved one is noncompensable absent physical impact); *Woodman v. Dever*, 367 So.2d 1061 (Fla.Dist.Ct.App.1979) (a child who witnessed robbery and sexual assault of mother was denied recovery because there was no physical impact on the child); *James v. Harris*, 729 P.2d 986 (Colo.Ct.App.1986) (parents who witnessed their child being run over by a car could not recover because they were not within the zone of danger).

the federal right. While we assume that "FELA jurisprudence gleans guidance from common-law developments," *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417 (citing *Urie v. Thompson*, 337 U.S. 163, 172-74, 69 S.Ct. 1018, 1026, 93 L.Ed. 1282 (1949)), we are not called upon to resolve matters of state law, nor predict how state courts would resolve them. Cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 364 (3d Cir.1990). Determining FELA liability is distinctly a federal question. *Urie*, 337 U.S. at 174-78, 69 S.Ct. at 1027-28.

While federal courts uniformly agree that claims for negligent infliction of emotional distress are cognizable under FELA, they are badly splintered as to the elements necessary to bring such a claim.

The Court of Appeals for the Seventh Circuit has held that FELA does not create a cause of action for emotional injuries absent actual or threatened physical impact. *Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir.1991) (quoting *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir.1985) (pre-*Buell* case) ("the critical question in this case is simply whether [plaintiff] has stated a claim under the FELA, which means a claim for a violation of one of the traditional 'physical' torts, such as assault, battery, and negligent infliction of personal injury, all of which are torts actionable under the [FELA]")). Accord *Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95, 98 (7th Cir.1988); *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1025 (7th Cir.1989).

The Court of Appeals for the Ninth Circuit has taken the position that purely emotional injuries are compensable under FELA, though it has yet to delineate the circumstances in which recovery is permitted. *Taylor v. Burlington N. R.R. Co.*, 787 F.2d 1309, 1313 (9th Cir.1986) (pre-*Buell* case). See *Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366, 1372 n. 2 (9th Cir.1987) (applying the "egg-shell plaintiff" doctrine to emotional claims if injury results in physical manifestation, in this case a heart attack).

The Court of Appeals for the Sixth Circuit has decided that FELA does not recognize a claim for *intentional* infliction of emotional distress resulting in purely emotional injuries. *Adkins v. Seaboard Sys. R.R.*, 821 F.2d 340, 342 (6th Cir.1987). It has yet to decide whether a claim for negligent infliction of emotional distress without verifiable physical manifestation is actionable. See *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 426 (6th Cir.1988); *Adams v. CSX Transp. Inc.*, 899 F.2d 536, 539 (6th Cir.1990). But in *Stoklosa* and *Adams*, the court took two potentially contradictory views of an employer's duty to its employees to provide an "emotionally safe" workplace.

In *Stoklosa* the court concluded that an employer's duty is defined by whether its conduct could be reasonably foreseen to cause an employee's emotional distress. 864 F.2d at 426. In *Adams*, however, the court concluded that "an employer has not breached its duty to provide an emotionally safe workplace unless the employer (acting

through its agents) engages in 'unconscionable abuse' of an employee." 899 F.2d at 540.[3]

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[3] We believe that the logic in *Adams* is flawed. By requiring "unconscionable abuse" as a prerequisite for recovery for purely emotional injury, the court relied on *Netto v. Amtrak*, 863 F.2d 1210 (5th Cir.1989) and footnote 13 in *Buell*. But *Netto* involved a claim for intentional infliction of emotional distress, 863 F.2d at 1214 n. 4, while the claim in *Adams* involved negligent infliction of emotional distress. This distinction is critical. Footnote 13 in *Buell* addressed the railway's contention that if claims for emotional injuries are cognizable under FELA, no employee will pursue grievance through the Railway Labor Act since every aggrieved worker will undoubtedly have suffered some degree of emotional anguish. The Court responded:

> This parade of horribles mistakenly assumes that a significant percentage of employees bringing grievances suffer the type of severe emotional injury that has generally been required to establish liability for purely emotional injury, and that a significant percentage of employees are subject to the type of *unconscionable abuse* which is prerequisite to recovery. In *Farmer v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), we held that a state action for *intentional* infliction of emotional distress was not pre-empted by the National Labor Relations Act (NLRA), and pointed out that the risk of interference with the NLRA was minimized by the fact that state law permitted "recovery only for emotional distress sustained as a result of 'outrageous' conduct."

480 U.S. at 567 n. 13, 107 S.Ct. at 1416 n. 13 (emphasis added). The Court here was discussing a claim for intentional infliction of emotional distress. Such claims require unconscionable or outrageous action. See William Prosser, The Law of Torts, § 12, at 60-65 (5th ed. 1984); Restatement § 46; *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974); *Fischer v. Maloney*, 43 N.Y.2d 553, 557, 402 N.Y.S.2d 991, 992-93, 373 N.E.2d 1215, 1217

The Court of Appeals for the Fourth Circuit requires plaintiff to show outrageous conduct as a predicate to a claim for negligent infliction of emotional distress under FELA, thus taking the same position as the Sixth Circuit *Adams* court. *Elliott v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1229 (4th Cir.1990) (citing *Buell*, 480 U.S. at 565-67 n. 13, 107 S.Ct. at 1416 n. 13; *Netto*, 863 F.2d at 1214-15). It

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(1978). Indeed the Court proceeded to distinguish claims for negligent and intentional infliction of emotional distress, concluding:

> [W]hether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity. . . . In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

480 U.S. at 569-70, 107 S.Ct. at 1417-18. Thus the Court did not intend to make unconscionable conduct a prerequisite for bringing a claim for emotional distress.

We fail to see why unconscionable conduct is required to bring a claim for *negligent* infliction of emotional distress. Even common law does not require it. See *Brown v. Cadillac Motor Car Div.*, 468 So.2d 903, 904 (Fla.1985); *Rickey v. Chicago Transit Auth.*, 98 Ill.2d 546, 550, 75 Ill.Dec. 211, 457 N.E.2d 1 (1983). Indeed, requiring outrageous conduct is logically inconsistent with the statute. The language of FELA refers to negligence only. The statutory language, however, has been extended to include liability for some intentional torts. See *Jamison v. Encarnacion*, 281 U.S. 635, 641, 50 S.Ct. 440, 442, 74 L.Ed. 1082 (1930). In this context, we find it odd that coverage is provided in an intentional tort, yet excluded when the injury arises out of negligence, specifically referred to in the statute, just because the plaintiff suffered an emotional injury.

declined to decide whether one may recover under FELA for purely emotional injuries without additional physical symptoms. *Id.*

The Court of Appeals for the First Circuit understands *Buell* as "an attempt to leave the door to recovery for wholly emotional injury somewhat ajar but not by any means wide open." *Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 694 (1st Cir.1987). The court declined "to make this a pioneer case exploring the frontier possibility opened up by *Buell*" and rejected plaintiff's claim because he failed to show causation between the alleged injury and the tortious conduct. *Id.* at 694, 696. Likewise, in *Robert v. Consolidated Rail Corp.*, 832 F.2d 3 (1st Cir.1987), the court avoided the issue and held that plaintiff failed to establish that Conrail could have reasonably foreseen that he would suffer a heart attack from stress of which Conrail was never informed. It declined to resolve whether a heart attack induced solely by stress and not accompanied by any precipitating physical injury is a compensable injury. *Id.* at 7. But see *Pierce*, 823 F.2d at 1372 n. 2 (emotional distress leading to heart attack is actionable under FELA).

The Court of Appeals for the Fifth Circuit has decided a series of cases on this issue. In *Hagerty v. L & L Marine Serv., Inc.*, 788 F.2d 315 (5th Cir.1986) (pre-*Buell* case), plaintiff was drenched with toxic, carcinogenic chemicals and suffered emotional injuries arising from cancerphobia. The court concluded that FELA allows plaintiffs to recover for psychic and emotional harm because it was intended to provide broad coverage for all work-related "injuries" whether characterized as physical

or mental. *Id.* at 318. On reconsideration, the court modified *Hagerty,* stating that a plaintiff may recover for serious mental distress assuming an "actionable injury." 797 F.2d 256 (1986).

In *Netto v. Amtrak,* 863 F.2d 1210 (5th Cir.1989) the court declined to decide whether a plaintiff may recover for purely emotional injuries under FELA because he had failed to show any evidence of unconscionable or outrageous conduct. *Id.* at 1214. While the Sixth Circuit position in *Adams* and the Fourth Circuit position in *Elliott* purportedly adopted the *Netto* holding, it is clear *Netto* is of a different genre because the court emphasized that the claim was only for intentional infliction of emotional distress. *Id.* at 1214 n. 4. The *Netto* court did not require unconscionable conduct for *all* claims for emotional distress. Rather, since it was presented with a claim based on intentional infliction of emotional distress only, it had no occasion to discuss negligent infliction of emotional distress. See supra n. 2.

In *Gaston v. Flowers Transp.,* 866 F.2d 816 (5th Cir.1989), a seaman saw his half-brother crushed to death and sued under the Jones Act.[4] The facts indicate that plaintiff, in some capacity, was not merely a witness, but was an active participant in the events: "Gaston [plaintiff] fell to the deck; but James [victim] slipped between the barge and the vessel and was crushed to death, despite Gaston's efforts to pull him to safety." *Id.* at 817. The court refused to provide recovery for an emotional injury

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[4] The Jones Act incorporates FELA. 46 U.S.C. § 688; *Ferguson v. Moore-McCormack Lines, Inc.,* 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511 (1957).

stemming from witnessing the violent death of a relative, reasoning that the plaintiff's injury was the result of watching another person die and was not a result of fear for his own safety. It thus rejected the bystander rule of liability and required that plaintiff be in the zone of danger to recover for emotional distress. *Id.* at 819 (restricting *Hagerty* as a "physical impact" case). The court left open the question whether a purely emotional injury is cognizable. *Id.* at 821.

In *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260 (5th Cir.1991), the plaintiff sued under the Jones Act for emotional harm suffered as a result of sexual harassment. The evidence showed that the plaintiff was subjected to tortious physical contact and that she suffered physical manifestations of harm, including weight loss, vomiting, and diarrhea. *Id.* at 265. The court held that in these circumstances the plaintiff's claim was cognizable under the Jones Act. The court did not reach the issue of whether a purely emotional injury would be cognizable. *Id.* at 266 n. 8.

In *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir.1991), the plaintiff, a tug boat captain with over 30 years experience, witnessed an explosion when a barge ruptured a pipeline. He helped to ease the emergency by moving several vessels to safety. No one was injured in the accident. Soon thereafter, he developed post-traumatic stress disorder and depression resulting from his belief that he could have been injured or killed. He sought to recover under the Jones Act for a purely emotional injury.

After thoroughly reviewing the case law and the different theories of recovery under common law, the court concluded that a plaintiff may recover if the injury resulted from a situation in which a reasonable person, normally constituted, would not be able to cope adequately with the mental distress arising from the circumstances. *Id.* at 1010. It reasoned "one who has suffered a significant emotional injury should not be denied recovery simply because the factual scenario does not satisfy some earlier-selected, fictitious method of authenticating the injury." *Id.* at 1011. The court stated in a broad stroke:

> Excepting our colleagues in the Ninth Circuit, our circuit brethern have indicated a reluctance to field the *Buell* pitch. We end that reluctance today, persuaded that an emotional injury can be every bit as harmful, debilitating, and destructive of the quality of one's life as a physical injury. We therefore hold that a claim for an emotional injury caused by emotional distress negligently inflicted, even without an accompanying physical injury or physical contact, is cognizable under the FELA.

Id. at 1009. Because one would not expect an experienced seaman to have such emotional reactions to fires in the oilfield, the court concluded that the injury was not a reasonably foreseeable consequence and therefore the claim was not congizable. Indeed, the treating psychiatrist testified that he was baffled by the plaintiff's reaction to the accident.

The Court of Appeals for the Fifth Circuit granted en banc rehearing. 954 F.2d 266 (1992). The en banc court agreed that the plaintiff's claim was not cognizable even under the most liberal theory of recovery. 966 F.2d 166

(1982). The court, however, concluded that the facts did not permit the court to decide whether a claim for purely emotional injuries is cognizable. It emphasized that *Gaston* continued to represent the law of the circuit. "The [*Gaston*] court recognized that a plaintiff suing for purely emotional injuries could recover if he also suffered physical injury. The court also determined that a bystander could not recover for merely witnessing harm to another where the plaintiff suffered no harm or threat of harm." *Id.* at 169. But the en banc court believed that *Gaston* left open the question whether a claim for purely emotional injury under a zone of danger theory is cognizable. *Id.*

It is clear that there are open conflicts among the circuits.[5] A review of the decisions in other circuits in the

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[5] In view of these conflicts, Justices White and Thomas believed that "a uniform rule should be announced by this Court on this important and recurring issue." *Ray v. Consolidated Rail Corp.*, ___ U.S. ___, ___, 112 S.Ct. 914, 914, 116 L.Ed.2d 813 (1992) (dissenting from a denial of certiorari); *Carroll v. Consolidated Rail Corp.*, ___ U.S. ___, ___, 112 S.Ct. 916, 916, 116 L.Ed.2d 816 (1992) (same).

The jurisprudence among the district courts is no more consistent. See for example, *Kiffe v. Neches-Gulf Marine, Inc.*, 709 F.Supp. 743, 745 (E.D.Tex.1989) (worker who witnessed death of coworker and who suffered purely emotional injuries failed to state a claim); *Welby v. Consolidated Rail Corp.*, 671 F.Supp. 1015, 1021 (M.D.Pa.1987) (heart attack suffered as a result of improper and unsafe working conditions was actionable); *Gillman v. Burlington N. R.R. Co.*, 673 F.Supp. 913, 917 (N.D.Ill.1987) (emotional distress claim is actionable only if it satisfies the zone of physical danger test); affirmed, 878 F.2d 1020 (7th Cir.1989); *Teague v. National R.R. Passenger Corp.*, 708 F.Supp. 1344, 1350 (D.Mass.1989) ("[T]his Court therefore rejects the *Gillman* approach to the extent that it permits recovery *only* if the 'zone of danger' test is satisfied. In addition to permitting recovery

wake of *Buell* indicates that there is no common discernable principle, test, view or attitude.

C.

We have refused to designate a particular common law test as *the test* in this circuit, choosing instead to take an ad hoc approach that focuses more on the facts rather than rules of law. In *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir. 1990), Holliday brought a FELA action against the railroad alleging that he was injured from the stress created when Conrail forced him to work on a job for which he claimed to have been unqualified. We held that the facts in the light most favorable to Holliday, considering the character of the allegedly tortious activity (putting him in a position for which he was unqualified) and the lack of physical impact on him, could not support a FELA claim. *Id.* at 427.

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under such circumstances, the Court also adopts the common law majority rule that actual or threatened impact is unnecessary to a negligent infliction of claim under FELA and that objective symptomatology of the mental distress will suffice.") (emphasis in original); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135, 144 (S.D.N.Y.1987) (suicide as a result of harassment is actionable); *Amendola v. Kansas City S. Ry. Co.*, 699 F.Supp. 1401, 1411 (W.D.Mo.1988) (mental anguish resulting from fear of contracting asbestos-related diseases is not actionable absent manifestations of physical injury); *Masiello v. Metro-North Commuter R.R.*, 748 F.Supp. 199, 205 (S.D.N.Y.1990) (emotional distress with an accompanying physical manifestation is actionable); *Smolsky v. Consolidated Rail Corp.*, 780 F.Supp. 283, 291 (E.D.Pa.1991) (harassment resulting in purely emotional injuries is actionable).

Holliday's claim was essentially for emotional injuries suffered from job stress. If an employee showing some possible negligence with psychological consequences will always present a jury question, even the most attenuated claims could be advanced. Because claims for negligent infliction of emotional distress are so fact-dependent, we declined to make broad pronouncements that could restrict future meritorious claims. We did not hold that there could not be a recovery for emotional injuries unless the plaintiff suffers a physical injury or unless there is an accident, as we did not need to reach these issues. We stressed that the allegedly tortious activity did not result in a physical injury to another party, which Holliday witnessed, or indeed injury to another party at all. In fact, there was no accident. Thus "our opinion is narrow." *Id.* at 426.

In *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3rd Cir.1991), Outten brought a FELA action for emotional injuries he sustained when he saw two railway cars were about to collide. There was a collision, but it took place a full mile away from Outten. Outten did not see the accident because he was running in the other direction and, like *Holliday*, no one was hurt. Outten failed to show how the railway breached a duty: He was neither a bystander who witnessed a closely-related person injured, see *Dillon v. Legg*, nor an active participant in the injury-causing event, see *Althoff v. Consolidated Rail Corp.*, 1988 WL 61734, 1988 U.S.Dist. Lexis 5343 (E.D.Pa.1988) (when a worker operated the instrumentality that killed a coworker, he became an "active participant" in the accident through the employer's negligence). There was thus no "solid basis in the present state of common law" to

permit recovery. 928 F.2d at 79. Because the Supreme Court has cautioned us to finely scrutinize the facts of the case, we declined to devise a generally applicable litmus test for FELA claims based on negligent infliction of emotional distress.

The core of the problem lies in the fundamental tension between two conflicting policies. On the one hand, common law doctrines are built on the suspicion that emotional distress claims are subject to fraud and frivolity. In *Outten* we rejected the notion that FELA liability extends to emotional injuries suffered when an employee "reasonably feared personal physical injury," believing such a rule would remove reasonable limits on these types of claims. 928 F.2d at 79. And in *Holliday* we adopted the policy considerations set forth in *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073, 1090 (E.D.Pa.1989): a need to prevent incalculable and potentially unlimited damages, a flood of litigation, and fraud. 914 F.2d at 424.

On the other hand, contrasting the often harsh and arbitrary doctrines of the common law is the policy underlying FELA itself. FELA was enacted in broad, open-ended terms so that recovery will be liberally granted and that an employer's standard of conduct will be malleable, and adapt to the changing realities of industrial conditions and standards. While courts must be neither an instrument for the opportunistic con-artist nor an understanding shoulder for the emotionally frail, we must follow Congress' mandate. So we must reconcile the two policies, discerning the trends and developments in common law and then gauging them according to the

policy underlying FELA, *for FELA is at* issue here and creates the cause of action.